Perry Brothers Trucking, Inc. *and* William Dorney.
Cases 14–CA–141149 and 14–CA–145134

May 25, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

The General Counsel seeks a default judgment in this case on the ground that the Respondent has failed to file an answer to the consolidated complaint and compliance specification. Upon a charge filed by employee William Dorney on November 17, 2014, in Case 14–CA–141149, and a charge and amended charge filed by Dorney on January 27 and March 24, 2015, respectively, in Case 14–CA–145134, the General Counsel issued a complaint against the Respondent on February 25, 2015, and a consolidated complaint on March 25, 2015. The Respondent failed to file any answer. On April 28, 2015, the General Counsel issued a compliance specification and an order consolidating the consolidated complaint and the compliance specification.[1] The Respondent again failed to file any answer.

On July 1, 2015, the General Counsel filed a Motion for Default Judgment with the Board. Thereafter, on July 6, 2015, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent's owner, Nora Hoffman, filed a timely response to the Notice to Show Cause, and the General Counsel filed a reply to the Respondent's response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Default Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in a complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. Similarly, Section 102.56 of the Board's Rules and Regulations provides that the allegations in a compliance specification will be taken as true if an answer is not filed within 21 days from service of the compliance specification. In addition, the complaint, consolidated complaint, and compliance specification affirmatively stated that unless an answer was received by March 11, April 8, and May 19, 2015, respectively, the Board may find, pursuant to a motion for default judgment, that the allegations in the complaints and compliance specification are true. Further, the undisputed allegations[2] in the General Counsel's motion disclose that the Region, by letter dated May 26, 2015, notified the Respondent that unless an answer was received by June 2, 2015, a motion for default judgment would be filed. On May 29, 2015, the Respondent's owner Nora Hoffman, during a phone conversation with the Region, confirmed that she had received the May 26, 2015 letter. However, the Respondent neither filed an answer nor requested an extension of time to do so before the June 2, 2015 deadline expired. Accordingly, and for the reasons discussed below, we find that the Respondent has not established good cause to excuse that failure.

The record does not indicate that the Respondent is represented by counsel. Although the Board, unlike the federal courts,[3] permits respondent corporations to appear without counsel, the Board has consistently held that the choice to forgo representation by counsel does not establish good cause for failing to file a timely answer. See, e.g., *Patrician Assisted Living Facility*, 339 NLRB 1153, 1153 (2003); *Sage Professional Painting Co*., 338 NLRB 1068, 1068 (2003). See also *Starrs Group Home, Inc*., 357 NLRB 1219, 1219–1220 (2011); *Lockhart Concrete*, 336 NLRB 956, 957 (2001). Where a respondent, represented by counsel or not, fails to respond to complaint allegations until after the Notice to Show Cause has issued, despite having been notified in writing that it must do so, and fails to establish good cause for this failure, subsequent attempts to file an answer will be denied as untimely. *Patrician Assisted Living Facility*, 339 NLRB at 1153–1154, citing *Kenco Electric & Signs*, 325 NLRB 1118, 1118 (1998).

Here, the Respondent does not dispute that it failed to respond to the complaint allegations until after the Notice to Show Cause issued, despite the General Counsel's reminders. In its response to the Notice to Show Cause, however, the Respondent asserts certain excuses for the failure to file an answer. First, the Respondent maintains that it "received a letter from the labor board that the case had been closed." In addition, the Respondent contends

[1] On May 8, 2015, the General Counsel issued an amendment to the consolidated complaint, correcting a typographical error in the consolidated complaint.

[2] Although the Respondent submitted a response to the Notice to Show Cause, it did not dispute the allegations in the motion.

[3] See *Rowland v. California Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194, 201–202 (1993) ("It has been the law for the better part of two centuries . . . that a corporation may appear in the federal courts only through licensed counsel."); *Palazzo v. Gulf Oil Corp*., 764 F.2d 1381, 1385 (11th Cir. 1985) ("The rule is well established that a corporation is an artificial entity that can act only through agents, cannot appear *pro se*, and must be represented by counsel."), cert. denied, 474 U.S. 1058 (1986).

that: "We have since closed and filed bankruptcy due to lack of work. Case 15-20294, I filed under my name as I was the only owner and all debt was in my name." Further, the Respondent raises certain defenses to the complaint allegation concerning the discharge of employee William Dorney.

In his reply to the Respondent's response, the General Counsel maintains that none of the matters raised in the Respondent's letter establish a sufficient basis to deny the motion for default judgment. The General Counsel denies issuing a letter stating that the cases had been closed. In addition, the General Counsel contends that the Respondent had no basis to believe that the cases were closed, noting the May 26, 2015 letter advising the Respondent of the consequences of not filing an answer to the complaint and the May 29, 2015 phone conversation repeating that information.

We find that the Respondent has failed to establish good cause to excuse its failure to file a timely answer. Despite the Respondent's assertion that it received a letter from the labor board stating that the case had been closed, the Respondent has not indicated when such a letter was received, or submitted a copy of the letter. Further, the Respondent does not dispute the General Counsel's contention that in the May 29, 2015 phone conversation with the Region, the Respondent was given additional notice of the need to file an answer and that the litigation was ongoing. In addition, neither the Respondent's cessation of operations nor its owner's personal bankruptcy proceedings constitutes good cause for failing to file an answer or for denying the General Counsel's motion.[4] Finally, regarding the Respondent's assertion of defenses to the complaint allegations, they are not properly before us because Respondent failed to show good cause for its late response. *Sage Professional Painting*, 338 NLRB at 1069; *Lockhart Concrete*, 336 NLRB at 957; *Dong-A Daily North America, Inc.*, 332 NLRB 15, 16 (2000).

[4] See, e.g., *OK Toilet & Towel Supply, Inc.*, 339 NLRB 1100, 1100–1101 (2003); *Dong-A Daily North America*, 332 NLRB 15, 15–16 (2000); *Holt Plastering, Inc.*, 317 NLRB 451, 451, 452 fn. 4 (1995) (respondent was not excused from filing an answer to compliance specification, even though the respondent notified the Board it had "ceased operations and liquidated the plant facilities"). Further, it is well established that the institution of bankruptcy proceedings does not deprive the Board of jurisdiction or authority to entertain and process an unfair labor practice case to its final disposition. See, e.g., *Cardinal Services, Inc.,* 295 NLRB 933, 933 fn. 2 (1989), and cases cited therein. Board proceedings fall within the exception to the automatic stay provisions for proceedings by a governmental unit to enforce its police or regulatory powers. See id., and cases cited therein; *NLRB v. 15th Avenue Iron Works, Inc.,* 964 F.2d 1336, 1337 (2d Cir. 1992) (per curiam). Accord: *Ahrens Aircraft, Inc. v. NLRB,* 703 F.2d 23, 24 (1st Cir. 1983).

Accordingly, in the absence of good cause being shown for the failure to file a timely answer to the complaint, consolidated complaint, and compliance specification, we deem the allegations to be admitted as true, and we grant the General Counsel's Motion for Default Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent has been a corporation with an office and place of business in Oklahoma City, Oklahoma (the Respondent's facility), and has been engaged in the interstate transportation of freight.

In conducting its operations during the 12-month period ending October 1, 2014, the Respondent derived gross revenues in excess of $50,000 for the transportation of freight from the State of Oklahoma directly to points located outside the State of Oklahoma. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of the Respondent within the meaning of Section 2(11) of the Act and agents of the Respondent within the meaning of Section 2(13) of the Act:

Nora Hoffman	Owner
Corrie Duncan	Dispatcher, Oklahoma City
Wade Duncan	Manager, Oklahoma City

The following events occurred, giving rise to this proceeding:

1. About August 29, 2014, Wade Duncan, at the Oklahoma City facility, instructed employees to not discuss their terms and conditions of employment, thereby restricting employees from engaging in protected concerted activity.

2. About September 18, 2014, Nora Hoffman, by phone, told employees that she was tired of drivers playing the log book game, that there would be changes the drivers would not like, and that if drivers did not like the changes, they could work elsewhere, thereby informing employees that it was futile for them to engage in protected concerted activity.

3. About mid-September 2014, Nora Hoffman, in an email, instructed employees to not discuss their terms and conditions of employment, thereby restricting employees from engaging in protected concerted activity.

4. About August 29, 2014, the Respondent's employees, including William Dorney, concertedly complained

to the Respondent regarding their wages, hours, and working conditions by meeting with managers and raising issues about hours, work instructions, record keeping, legal hour limits, and other terms and conditions of employment.

5. From late August through September 24, 2014, Dorney concertedly complained to the Respondent regarding employee wages, hours, and working conditions by requesting to meet with management about these issues and by raising with management employees' concerns about their hours, record keeping, guidelines regarding work hours, changes in pay, benefits, and other working conditions.

6. About September 24, 2014, the Respondent laid off and discharged Dorney.

7. The Respondent engaged in the conduct described above in paragraph 6 because Dorney and other employees engaged in the conduct described above in paragraphs 4 and 5, and to discourage employees from engaging in these or other concerted activities.

CONCLUSION OF LAW

By the conduct described in paragraphs 1, 2, 3, 6, and 7, the Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act. The Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated Section 8(a)(1) by discharging William Dorney, we shall order the Respondent, in the event that it resumes the same or similar business operations,[5] to offer Dorney full reinstatement to his former position or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed. We shall also order the Respondent to make Dorney whole for any loss of earnings and other benefits suffered as a result of the unlawful discharge by paying him the amount set forth in the compliance specification's Appendix A, with interest accrued to the date of payment, as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010), and minus tax withholdings required by Federal and State laws.

Additionally, we shall order the Respondent to compensate Dorney for any adverse tax consequences of receiving a lump-sum backpay award and to file, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report with the Regional Director for Region 14 allocating the backpay award to the appropriate calendar year. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016). Further, we shall order the Respondent to remove from its files any reference to the unlawful discharge of Dorney, and to notify him in writing that this has been done and that the unlawful discharge will not be used against him in any way.

Finally, in view of the fact that the Respondent ceased operations on February 18, 2015, we shall order the Respondent to mail a copy of the attached notice to the Union and to the last known addresses of its former employees who were employed at any time since August 29, 2014, in order to inform them of the outcome of this proceeding.[6]

ORDER

The National Labor Relations Board orders that the Respondent, Perry Brothers Trucking, Inc., Oklahoma City, Oklahoma, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Instructing employees to not discuss their terms and conditions of employment.

(b) Making remarks that inform employees that it is futile to engage in protected concerted activity.

(c) Discharging employees because they engage in protected concerted activities and to discourage employees from engaging in these activities.

[5] As set forth in the compliance specification, the backpay period for Dorney began on September 24, 2014, and ended when the Respondent ceased operations on February 18, 2015.

[6] In the consolidated complaint, the General Counsel has requested that the Respondent's representative be required to read the notice to employees. We deny the request because the General Counsel has not shown that the Board's traditional remedies are insufficient to remedy the violations committed by the Respondent. See *Fallbrook Hospital*, 360 NLRB No. 73, slip op. at 1, fn. 3 (2014), enfd. 785 F.3d 729 (D.C. Cir. 2015); *First Legal Support Services, LLC*, 342 NLRB 350, 350 fn. 6 (2004).

Additionally, the General Counsel has requested that Dorney be reimbursed for any out-of-pocket expenses incurred while searching for work as a result of his unlawful discharge. Because the relief sought would involve a change in Board law, we believe that the appropriateness of this proposed remedy should be resolved after a full briefing by the affected parties, and there has been no such briefing in this case. Accordingly, we decline to order this relief at this time. See, e.g., *The H.O.P.E. Program*, 362 NLRB No. 128, slip op. at 2, fn. 1 (2015); *Ishikawa Gasket America, Inc.*, 337 NLRB 175, 176 (2001), enfd. 354 F.3d 534 (6th Cir. 2004), and cases cited therein.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) In the event that the Respondent resumes the same or similar business operations, within 14 days thereafter, offer William Dorney full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make William Dorney whole for the loss of earnings and benefits suffered as a result of his unlawful discharge, by paying him the amount of $13,897, plus interest accrued to the date of payment, and minus tax withholdings required by Federal and State laws, as set forth in the remedy section of this Decision.

(c) Compensate Dorney for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 14, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.[7]

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Dorney, and within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

(e) Preserve and, within 14 days of a request or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, duplicate and mail, at its own expense and after being signed by the Respondent's authorized representative, copies of the attached notice marked "Appendix"[8] to all employees who were employed by the Respondent at any time since August 29, 2014. In addition to physical mailing of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 14 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. May 25, 2016

Mark Gaston Pearce, Chairman

Philip A. Miscimarra, Member

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT instruct you to not discuss your terms and conditions of employment.

WE WILL NOT make remarks that inform you that it is futile to engage in protected concerted activity.

WE WILL NOT discharge you because you engaged in protected concerted activities or to discourage you from engaging in these activities.

[7] The compliance specification indicates that although there is currently no excess tax liability on the backpay for Dorney, there may be excess tax liability on the interest, which continues to accrue to the date of payment.

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Mailed by Order of the National Labor Relations Board" shall read "Mailed Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, in the event that we resume the same or similar business operations, within 14 days thereafter, offer William Dorney full reinstatement to his former position, or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make William Dorney whole for any loss of earnings and other benefits suffered as a result of his unlawful discharge, by paying him the amount set forth in the Board's Order, plus interest accrued to the date of payment, and minus tax withholdings required by Federal and State laws.

WE WILL compensate William Dorney for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 14, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of William Dorney, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the unlawful discharge will not be used against him in any way.

PERRY BROTHERS TRUCKING, INC.

The Board's decision can be found at www.nlrb.gov/case/14–CA–141149 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.